

NO. 137, ORIGINAL

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IN THE  
SUPREME COURT OF THE UNITED STATES

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STATE OF MONTANA, Plaintiff

v.

STATE OF WYOMING

AND

STATE OF NORTH DAKOTA, Defendants

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BEFORE THE HONORABLE BARTON H. THOMPSON, JR.  
SPECIAL MASTER

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REPLY IN SUPPORT OF MOTION TO STRIKE THE REPORT AND EXCLUDE  
THE TESTIMONY OF DOUGLAS R. LITTLEFIELD, PH.D.

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The State of Wyoming offers the following reply in support of its motion to strike the report and exclude the testimony of Douglas R. Littlefield, Ph.D.:

Montana contends that the question of "whether the drafters of the Compact intended to impose specific requirements on a State's post-Compact administration of waters within its borders as a prerequisite to that State's enjoyment of its Compact rights" remains an open question in this litigation. (MT Br. at 6). It is not. Wyoming agrees that Montana remains free to administer the waters of the State of Montana in any manner it sees fit pursuant to Article XVIII of the Compact. However, once Montana seeks to assert its pre-1950 Compact rights against Wyoming, its internal administration must be measured against "the laws governing the acquisition and use of water under the doctrine of appropriation." Art. V(A). These fairly uniform laws are based on a few fundamental principles, including the maxim that beneficial use is the basis, the measure, and the limit of the right.<sup>1</sup> Demonstration that Montana substantially adheres to these fundamental principles is a necessary prerequisite to Montana's enjoyment of its pre-1950 Compact rights. In fact, the Special Master recognized as much when he specifically found that "Article V(A) provides not for the continued enjoyment of pre-1950 rights in the abstract but for their continued enjoyment in accordance with such laws." First Interim Report of the Special Master at 38. Accordingly, this issue has been decided, the

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<sup>1</sup> The doctrine of appropriation is just an orderly method of addressing shortages. Fundamentally, a senior appropriator demanding water under such a system has to demonstrate a present need for the water, the ability to put that water to beneficial use, and that he, rather than some other junior appropriator, will actually receive the water he is demanding. The fact that Montana's internal system of water rights administration assures none of these things is a consequence Montana, not Wyoming, must bear.

plain language of the Compact governs, and the testimony of Mr. Littlefield to the contrary ought to be excluded.

Moreover, allowing Mr. Littlefield to testify would be a monumental waste of time. Mr. Littlefield offers to testify not from his own personal knowledge to a host of hearsay statements and then follow that up with a series of legal conclusions. Surely, there are better ways to spend valuable trial time. Of course, following the procedure requested by Montana allowing the testimony and then striking all the interesting parts is an even bigger waste of time. Accordingly, in addition to the reasons outlined in the original motion, Mr. Littlefield's testimony also ought to be excluded under Federal Rule of Evidence 403.

WHEREFORE the State of Wyoming requests that the Court strike the expert report and exclude the testimony of Mr. Littlefield from these proceedings.

Dated this 22<sup>nd</sup> day of July, 2013.

Respectfully submitted,

THE STATE OF WYOMING



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## CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the Reply in Support of Motion to Strike the Report and Exclude the Testimony of Douglas Littlefield was served by electronic mail and by placing the same in the United States mail, postage paid, this 27<sup>th</sup> day of July, 2013.

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